Supreme Court, U.S.
FILED
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Nos. 14-1418, -1453, -1505, 15-35, -105, -119, -191

In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*, *Petitioners* v.
SYLVIA BURWELL, *et al.*, *Respondents*

PRIESTS FOR LIFE, *et al.*, *Petitioners* v. DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*, *Respondents*

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*, *Petitioners* v. SYLVIA BURWELL, *et al.*, *Respondents*

EAST TEXAS BAPTIST UNIVERSITY, *et al.*, *Petitioners* v.
SYLVIA BURWELL, *et al.*, *Respondents*

LITTLE SISTERS OF THE POOR, *et al.*, *Petitioners* v.
SYLVIA BURWELL, *et al.*, *Respondents*

SOUTHERN NAZARENE UNIVERSITY, *et al.*, *Petitioners* v.
SYLVIA BURWELL, *et al.*, *Respondents*

GENEVA COLLEGE, *Petitioner* v.
SYLVIA BURWELL, *et al.*, *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, FIFTH, TENTH, AND D.C. CIRCUITS

BRIEF OF BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

K. Hollyn Hollman
Jennifer Hawks
Baptist Joint Committee
200 Maryland Ave., NE
Washington, DC 20002
202-544-4226
hhollman@bjconline.org

Douglas Laycock
Counsel of Record
University of Virginia
Law School
580 Massie Road
Charlottesville, VA 22903
434-243-8546
dlaycock@virginia.edu

QUESTION PRESENTED

This brief addresses two questions:

Whether petitioners have shown a substantial burden on their exercise of religion, and

Whether the government's voluntary decision to exempt the insurers of churches and their integrated auxiliaries requires it to also exempt the insurers of the much larger class of all religious non-profits.

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INTEREST OF AMICUS

The Baptist Joint Committee for Religious Liberty has vigorously supported the free exercise of religion for all of its eighty years. The BJC's General Counsel in the early 1990s, Oliver S. Thomas, chaired the Coalition for the Free Exercise of Religion, which successfully argued for enactment of the Religious Freedom Restoration Act.[1]

The BJC serves fifteen supporting organizations, including state and national Baptist conventions and conferences. It addresses only religious liberty and church-state separation issues, and believes that strong enforcement of both Religion Clauses and of RFRA is essential to religious liberty for all Americans.

The BJC's deep commitment to free exercise of religion requires its opposition to petitioners' far-reaching claims, which ultimately endanger religious liberty.

SUMMARY OF ARGUMENT

I. Petitioners' religious exercise has not been substantially burdened.

A. Petitioners demand absolute deference on the issue of substantial burden. They are entitled to *substantial* deference, but not to absolute deference. In five cases, this Court found no legally cognizable burden on religion even though claimants sincerely believed there was such a burden; petitioners'

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[1] This brief was prepared entirely by amicus and its counsel. No other person made any financial contribution to its preparation or submission. Blanket consents are on file with the Clerk.

absolute-deference theory would require overruling all five.

On the analogous threshold question of who counts as a minister for purposes of the ministerial exception, the Court gave substantial deference to the church's own understanding. But it ultimately decided for itself whether the employee was a minister.

Hobby Lobby said that courts should defer to religious understandings on the issue of burden, but it did not specify whether that deference should be substantial or absolute. Little deference was needed to identify the burden in that case: the religious claimants were required to provide what they believed were prepaid abortifacients.

Absolute deference to claimants would produce absurd results that would discredit the cause of religious liberty. These petitioners say they cannot do business with any insurer that separately provides contraception to their employees; others might say they cannot do business with any insurer that provides contraception to anyone. Some believers think God will punish the country if controversial public policies are not reversed. Petitioners' theory requires absolute deference to all such claims.

Congress unanimously amended RFRA to ensure that courts would decide which burdens on religious exercise are substantial. Congress also said that courts should look to existing precedent—cases in which courts decided the substantial-burden question.

Lower-court precedent graphically illustrates the danger of too little deference to religious

understandings, and Congress amended RFRA to address those cases. But absolute deference is also untenable.

B. The regulations in these cases do not substantially burden petitioners' religious exercise. Petitioners have been wholly exempted from providing contraception themselves. They object to the government delivering contraception separately, with segregated funds and segregated communications, through petitioners' secular insurers.

Petitioners' briefs make clear that they would object even if they were wholly unregulated. Suppose government repealed all regulation of employers, and required only that insurers and third-party administrators of employer-sponsored plans provide contraception separately from those plans. These petitioners would say that this regulation of their secular insurers substantially burdened the religious exercise of insuring their employees.

Petitioners' objection is not saved by saying that they cannot provide contact information for their insurers, or that they cannot contract with insurers that provide contraception. No matter how they phrase it, they are objecting to the government's regulation of their secular insurers. This case is ultimately like *Bowen v. Roy*: government need not conform its own affairs—whether insurance regulation or record keeping—to petitioners' religious understandings.

The statute speaks of substantial burden and compelling interest as a form of balancing, and so do many of this Court's cases. A less than fully compelling interest can justify any modest,

attenuated burden the Court may find lurking here.

II. The government has exempted churches and their integrated auxiliaries *and* their insurers, making no effort to deliver free contraception to their employees. Petitioners' claim that this exemption requires similar treatment for them is a mortal threat to thousands of specific religious exemptions enacted by the political branches.

A. State and federal RFRAs protect religious liberty with a standard; specific exemptions provide more reliable protection within their scope by enacting rules. Claimants outside such specific exemptions are still protected by state and federal RFRAs and constitutions.

B. There are ever-expanding circles of potential claimants to religious exemptions, from the church itself, to the most marginally religious individual or organization, to the wholly secular. Any specific exemption must draw a boundary somewhere, and no matter where the boundary is drawn, some entities just outside the exemption will not be much different from some entities just inside it. Exemptions that discriminate between faiths or denominations are invalid. But courts should defer to reasonable nondiscriminatory efforts to exempt the core of religious exercise without exempting the periphery.

C. If legislatures and administrative agencies cannot enact a narrow religious exemption without it being turned into a much broader religious exemption, many of them will not enact any religious exemptions at all, and many existing religious exemptions will be repealed.

D. The narrow scope of the exemption for

insurers of churches and their integrated auxiliaries is sound. Churches and other places of worship are the core of communal religious exercise; integrated auxiliaries are those religious entities most closely integrated with the core. The line is imperfect, but it is nondiscriminatory and entirely reasonable.

The narrow scope of this exemption is justified by the government's willingness to provide extra protection to the core of religious exercise while minimizing the number of employees harmed. Expanding this narrow exemption as petitioners demand would vastly increase the number of employees without access to free contraception.

ARGUMENT

Amicus and its counsel have worked for a quarter century to enact, implement, and defend the Religious Freedom Restoration Act. For most of that time, RFRA cases have been difficult to win. Many courts have been too slow to find substantial burdens on religious exercise, and too quick to find compelling government interests. Claims under the Free Exercise Clause have been even more difficult. We hope that four recent decisions from this Court—*Holt*, *Hobby Lobby*, *Hosanna-Tabor*, and *O Centro*—will help.[2] We believe these cases were correctly decided, and we hope that this Court and lower courts will follow their lead and build more secure protection for religious liberty. In light of this history, we are extremely

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[2] *Holt v. Hobbs*, 135 S. Ct. 853 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

reluctant to oppose a RFRA claim.

But religious liberty can be endangered by exaggerated claims and overreaching as well as by government intransigence and judicial under enforcement. Petitioners' arguments endanger religious liberty, both legally and politically.

Petitioners' claim that they are entitled to absolute deference on the issue of substantial burden tends to discredit RFRA and the cause of religious liberty. It would give rise to extreme and untenable claims that courts could not question.

Petitioners also argue that because the government voluntarily exempted churches and their insurers, making no effort to provide contraception to church employees by alternative means, it is required to give the same exemption to all religious non-profits and *their* insurers. Such a rule would be a mortal threat to the common and important practice of legislatures and administrative agencies enacting specific religious exemptions. If legislators or administrators believe that any narrow religious exemption will automatically lead to a much broader religious exemption, many of them will not enact any exemptions at all.

The regulations at issue in these cases represent a sophisticated and good-faith effort to exempt petitioners from any obligation to provide contraception, while requiring secular insurers to provide it instead. Petitioners' claim is not just that they should be relieved from providing contraception—a claim we would support without reservation. Petitioners claim that their secular insurers should be exempt as well. And that claim reaches too far.

I. Petitioners' Religious Exercise Has Not Been Substantially Burdened.

Petitioners make two distinct claims about substantial burden. We will separate these claims, because one has more radical implications than the other.

Petitioners' broad methodological claim is that they are entitled to absolute deference on the issue of substantial burden. Petitioners' narrower operational claim is that they are required to perform specific acts that their religion prohibits.

A. Petitioners Are Entitled to Substantial Deference on the Issue of Burden, but Not to Absolute Deference.

Petitioners demand absolute deference on the substantial-burden issue. They do not use that phrase, but that is their argument. The East Texas Baptist petitioners say that "the *only* questions courts may resolve are whether the objector's beliefs are truly held and whether the pressure" of threatened penalties is substantial. ETBU Br. 49 (internal quotations and citation omitted; emphasis added). "That is the end of the substantial burden inquiry." *Ibid.*

Bishop Zubik's petitioners agree. "[C]ourts cannot inquire into how 'substantial' a religious practice is." Zubik Br. 38. And therefore, "the substantial-burden inquiry looks to the substantiality of the *penalty* imposed on a person for engaging in *any* religious exercise." *Ibid.*

Each of these formulations is a demand for absolute deference on the substantial-burden issue. This cannot be right. But it contains important

elements of truth. Courts cannot question petitioners' sincere religious beliefs. If petitioners sincerely say the burden in these cases is substantial, then it is substantial *to them*. And that is a fact entitled to great weight.

But substantial to the believer is not inevitably the same as substantial in law. Courts must ultimately decide whether the burden is legally substantial within the meaning of the statute. Petitioners are entitled to substantial deference on that issue. They cannot be entitled to absolute deference.

1. Absolute Deference Is Inconsistent with Precedent.

a. If substantial burden in law is anything petitioners sincerely say it is, then all of this Court's cases finding no substantial burden on religious exercise must be overruled. Plaintiffs in *Bowen v. Roy* believed that the government's use of a social security number to maintain their daughter's welfare records would sap her spiritual strength. 476 U.S, 693, 696 (1986). The government did not question their sincerity. But this Court unanimously held that the government's use of the social security number imposed no cognizable burden on the plaintiffs' exercise of religion. *Id.* at 699-701. The Court did not give absolute deference to plaintiffs' sincere religious belief.

Similarly in *Lyng v. Northwest Indian Cemetery Protective Association*: plaintiffs sincerely believed, and a government study agreed, that a logging road would disrupt their spiritual meditation. 485 U.S. 439, 442 (1988). No doubt the plaintiffs' religious exercise was substantially burdened *in fact*, but again

the Court found no *legally* cognizable burden. *Id.* at 447-53. The Court did not give absolute deference to the plaintiffs' belief that their religious practice was burdened.

Petitioners say that in *Bowen* and *Lyng*, the religious claimants were not required to perform any act. ETBU Br. 53-55; Zubik Br. 45-47. That is true of *Lyng*; *Bowen* is less clear. *See* Resp. Br. 45-46. Here, by contrast, petitioners have to contract with insurers that will provide contraception separately, and they have to send the insurers' contact information to the government.

By offering this distinction, petitioners concede that courts at least do not owe absolute deference where the government requires no act of the believer. And that concession necessarily entails the further concession that courts can consider the legal significance of religious judgments—a conclusion that does not depend on whether the government requires any act.

The plaintiffs in *Lyng*—and in *Bowen* on petitioners' reading—said that their religious exercise was burdened despite the absence of any required act. This was a religious belief, and on petitioners' theory, courts had to accept this religious belief. Courts could not accord significance to a required act, or to its absence, when the believers said that religiously, there was no such significance.

But the Court did give weight to the absence of any required act, despite religious beliefs to the contrary. However great a burden the plaintiffs experienced in their own religious understanding, they did not experience a burden cognizable in law. And if courts

can assess the legal significance of a believer's religious judgment about the absence of any required act, courts can assess the legal significance of other religious judgments.

b. Other cases found no burden on religious exercise even though religious claimants were required to perform many substantial acts. The Court unanimously held that applying a generally applicable tax to sales of religious books, magazines, and recordings "imposes no constitutionally significant burden on appellant's religious practices." *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 392 (1990).

And it unanimously held that requiring a religious ministry to pay the minimum wage, and requiring its employees to accept that wage, was not a cognizable burden on the religious exercise of employees with religious convictions against receiving wages for serving their church. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985). The Court said that enforcing the law would not cause religiously significant changes, but that was not the employees' view. The Court evaluated their religious objection and held it insubstantial. *Id.* at 303-05.

The Court also held that requiring an Orthodox Jewish merchant to close his store on Sundays imposed only an indirect burden on his religious practice of closing on Saturdays, and that this indirect burden did not trigger the protections of the Free Exercise Clause. *Braunfeld v. Brown*, 366 U.S. 599, 605-07 (1961) (plurality). Braunfeld sincerely believed that his religious exercise was burdened, and plainly

it was burdened in fact, but the Court decided for itself whether it was burdened in law.

We believe that these three cases were not as easy as the Court made them out to be. But they certainly reject any rule of absolute deference to religious claims of substantial burden, even when the claimant is required to act in order to comply with the law, and even when, as in *Alamo*, claimants sincerely believe that their religion prohibits the required act. All three must be overruled if courts cannot question a sincere claim of substantial burden on religious exercise.

c. Conversely, government may substantially burden religious exercise by taking direct action against a believer, even if it requires no affirmative act by anyone. Government would substantially burden religious exercise if it burned religious books or confiscated sacred objects. A powerful example in the legislative hearings leading to RFRA were cases of unnecessary autopsies on Hmong animists and Orthodox Jews with religious objections to mutilating human bodies. S. Rep. 103-111 at 8 & nn.13-14 (1993); H.R. Rep. 103-88 at 6 n.14 (1993); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 229-30 & nn.116-17 (1994) (collecting statements in the hearing record). Acts required of believers are important to the analysis, but neither the presence nor absence of such acts is dispositive.

d. Another example of less-than-absolute deference to religious understandings of a religious question is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). *Hosanna-Tabor* presented a similar threshold issue of whether the claimant was within the scope of a rule

protecting religious liberty: Was the plaintiff in that case a "minister"—a person in a position of religious leadership—for purposes of the ministerial exception?

Who is a minister is a religious question, ultimately dependent on theological understandings of ministry. And the Court gave substantial weight to the church's self-understanding. The Court emphasized that the church had held the plaintiff out as a minister. *Id.* at 707. It quoted and credited the church's statements to and about the plaintiff. *Ibid.* But the Court did not give absolute deference to the church; it decided for itself that she was a minister. *Id.* at 707-09. Similar deference to religious self-understanding—substantial but not absolute; deference but not abdication—is appropriate on questions of substantial burden.

e. Another case that might have to be overruled on petitioners' theory is *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The religious claimants in that case were fined $5. *Id.* at 208. If the magnitude of the penalties is all that matters, the burden there was insubstantial. The substantial burden lay in the impact of the state's demands on Amish religious practice. *Id.* at 211-12, 215-19.

2. *Hobby Lobby* Does Not Require Absolute Deference.

Petitioners' demand for absolute deference relies on an ambiguous passage in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777-79 (2014). ETBU Br. 50; Zubik Br. 42. The *Hobby Lobby* plaintiffs said that they could not provide drugs and devices they believed to be abortifacients, and the Court said it could not question that religious judgment. The Court did not

cite, distinguish, or overrule *Bowen*, *Lyng*, *Swaggart*, or *Alamo*; it did not cite *Braunfeld* with respect to burden, but only on whether RFRA protects business owners. *Id.* at 2767, 2769-70, 2773.

Hobby Lobby is an important statement of judicial deference to religious understandings. But it does not specify whether that deference is to be absolute or substantial. And it does not consider what to do with extreme cases, because the facts before it were hardly extreme.

The religious claimants in *Hobby Lobby* were required to arrange for, contract for, and pay for drugs and devices that could not be used in any way without creating a risk, beyond anyone's power to control, of causing what the claimants understood to be the killing of an innocent human being. Employees could freely choose these drugs and devices, without cost and without reducing other benefits available under the insurance policy, because the Affordable Care Act abolished coverage limits except for specific nonessential services. 42 U.S.C. §300gg-11. In the plaintiffs' understanding, they were required to provide prepaid abortifacients. There was nothing attenuated about that claim; the only deference required was to take the claimants' religious beliefs seriously.

Hobby Lobby should not be read to commit the Court to an untenable theory of absolute deference. Even if *Hobby Lobby* had said absolute deference, such a statement would have been dictum, because nothing approaching absolute deference was needed in that case. There are sound reasons why seven

courts of appeals refused to read *Hobby Lobby* as requiring absolute deference.[3]

3. Absolute Deference Is Untenable and Would Discredit Religious Liberty.

Petitioners' theory of absolute deference would lead to untenable consequences, with or without a limitation to cases in which the religious claimant is required to perform some religiously prohibited act. What if the *Bowen* plaintiffs had said that the government using social security numbers for *anyone*, not just for their own daughter, would sap their spiritual strength? Courts would have to give absolute deference to that claim of substantial burden too. A plaintiff claiming that God will punish the country and all its citizens, including the plaintiff, if some controversial public policy is not reversed, would state a claim of substantial burden to which the courts would owe absolute deference.

Confining absolute deference to cases where government requires some religiously prohibited act does not solve the problem. Suppose a believer sincerely says that his religion prohibits him from submitting to the authority of any government that permits abortion (or fails to prosecute killings by police officers). He cannot obey its laws, pay its taxes, or give it information about his business. On peti-

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[3] In addition to the cases from four circuits consolidated here, see *Michigan Catholic Conference v. Burwell*, 807 F.3d 738, 747-48 (6th Cir. 2015); *Catholic Health Care System v. Burwell*, 796 F.3d 207, 217-18 (2d Cir. 2015); *University of Notre Dame v. Burwell*, 786 F.3d 606, 615-16 (7th Cir. 2015), *cert. pending*, No. 15-812.

tioners' theory, courts would owe absolute deference to this claim of substantial burden.

More prosaically, if a worshiper who is late for church is stopped for speeding, he will miss even more of the worship service. If he says that his religious beliefs required him to speed directly to church that morning, and that therefore, the speed limit as applied to him, or the requirement that he stop in response to the officer's demand, substantially burdened his exercise of religion, the court does not have to hold that these burdens are legally substantial.

Missing much of the worship service is a substantial religious loss. The speeding ticket is a proximate cause of that religious loss. But speeding, and refusing to stop for an officer, are not in themselves religious acts, and compliance does not usually have religious consequences. The driver's sincere belief that speeding and refusing to stop were religiously required on this occasion does not require courts to say as a matter of law that the traffic laws are a substantial burden on religious exercise.

Another example comes from the Manager's Statement explaining the Religious Land Use and Institutionalized Persons Act. Senators Hatch and Kennedy said that "a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'" 146 Cong. Rec. 16,700 (July 27, 2000). But why not, if the owner says it is a substantial burden? Because substantial burden is ultimately a legal question, and the courts do not owe

absolute deference to the religious claimant's sincere claim of burden. The answer would not change if the owner sincerely believes that his religion requires him to maximize profit from the building and donate it all to the church.

The problem is aggravated if, as petitioners argue, the required act is simply engaging in a transaction with some secular entity that then acts in a way that petitioners disapprove. Zubik Br. 34-36. Petitioners say they cannot do business with an insurance company that provides separate contraception coverage to their employees. Suppose they said they could not do business with any insurance company that provides contraception coverage for anybody, wherever employed. That would be a more extreme claim, seeking to control a wider range of third-party behavior. But it is no different in principle; it would still be entitled to absolute deference on petitioners' theory. If they sincerely said they cannot contract with any insurer that complies with the Affordable Care Act, that would be "the end of the substantial burden inquiry." ETBU Br. 49.

Petitioners' theory of absolute deference to religious claims of substantial burden would lead to absurd results that would discredit RFRA and the cause of religious liberty. It would increase the political pressure for repeal or damaging amendments to both the federal RFRA and the many state RFRAs.

4. Congress Intended "Substantial Burden" to Be a Justiciable Question.

Congress did not discuss the meaning of substantial burden in any detail. But Congress clearly rejected absolute judicial deference to religious

claimants. Congress intended the substantial-burden requirement to be a meaningful part of RFRA's "workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §2000bb(a)(5). Absolute deference on substantial burden would effectively repeal half of RFRA's statutory design.

a. Despite overwhelming support for its core provisions, RFRA got caught up in abortion politics and was debated for more than three years. For all but the last few days, all the RFRA bills said that government "shall not restrict" or "shall not burden" a person's religious exercise without compelling justification. *See, e.g.*, S. 578 and H.R. 1308 in the 103rd Congress; S. Rep. 103-111 at 3 (1993); H.R. Rep. 103-88 at 10 (1993).

On the day of final passage in the Senate, the lead sponsors offered a floor amendment to insert the word "substantially" in five places before the words "burden" and "burdened." 139 Cong. Rec. 26,180 (Oct. 26, 1993). Senator Kennedy said the amendment was "intended to make it clear" that the bill applied only to substantial burdens, and not to "every governmental actions [sic] that have an incidental effect on religious institutions." *Ibid.* Senator Hatch said the bill would "not require the Government to justify every action that has some effect on religious exercise." *Ibid.* Both said that the amendment was consistent with pre-*Smith*[4] case law and that it merely clarified what the bill had meant all along. The amendment was unanimously accepted without further debate. *Ibid.* The House, which had already

[4] *Employment Division v. Smith*, 494 U.S. 872 (1990).

passed the bill without "substantially," unanimously accepted the amendment after a similar explanation. 139 Cong. Rec. 27,239-41 (Nov. 3, 1993).

No one explained what hypotheticals triggered this last minute concern with insubstantial burdens. But plainly the sponsors feared that "burden," without a modifier, might be interpreted too loosely. Courts were to insist on "substantial" burdens. Courts deciding whether and which burdens are substantial is plainly inconsistent with any rule of absolute deference to litigants. Under petitioners' argument, inserting "substantially" clarified nothing.

b. Senator Kennedy was largely paraphrasing the Senate committee report, which referred eight times to a requirement that burdens on the exercise of religion be "substantial." S. Rep. 103-111 at 8-9, 13-15 & n.43. The Committee continued: "The act thus would not require such a [compelling] justification for every government action that may have some incidental effect on religious institutions." *Id.* at 9. The House Report referred both to "burdens," unmodified, H.R. Rep. 103-88 at 6, and to "substantially burdened," *id.* at 7. Any ambiguity was resolved when the House accepted the Senate amendment.

c. Both committee reports said that courts should look to pre-*Smith* cases to interpret RFRA's core provisions, including "whether the exercise of religion has been substantially burdened." S. Rep. 103-111 at 8; *accord*, H.R. Rep. 103-88 at 6-7. Those cases of course included *Bowen*, *Lyng*, *Swaggart*, *Alamo*, and *Braunfeld*, all rejecting sincere claims that government had burdened the claimants' religious exercise. The Senate report also clarified that the "bill is not a codification of the result in any prior free exercise

decision but rather the restoration of the legal standard that was applied in those decisions." S. Rep. 103-111 at 9.

d. The 2000 amendments to RFRA moved beyond the pre-*Smith* case law in important ways. RLUIPA amended RFRA's definition of "exercise of religion" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000bb-2(4), incorporating by reference 42 U.S.C. §2000cc-5(7).

This amendment responded to lower court decisions holding that RFRA did not protect religiously motivated acts unless those acts were compulsory, or central, in the believer's faith tradition. These extra-textual requirements were often explained in terms of the substantial-burden requirement. *See, e.g., Sasnett v. Sullivan*, 908 F. Supp. 1429, 1440-41 (W.D. Wis. 1995) (collecting cases), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997).

We will note some extreme examples, some decided under RFRA, and some under other protections for religious liberty. The Second Circuit held that prohibiting Christian prayer clubs does not burden the exercise of religion (and thus requires no justification), because unlike Muslim prayer, Christian prayer is not required at any particular time or place. *Brandon v. Board of Education*, 635 F.2d 971, 977 (2d Cir. 1980). Some courts held that there was no burden on religious exercise if the believer could escape the burdensome regulation by selling her business. *E.g., Smith v. Fair Employment & Housing Commission*, 913 P.2d 909, 926 (Cal. 1996).

The Supreme Court of Florida, interpreting a state RFRA that defined religious exercise to mean any act "substantially motivated by a religious belief, whether or not ... compulsory or central,"[5] held that even so, no burden is substantial unless it interferes with a compulsory religious practice. *Warner v. City of Boca Raton*, 887 So.2d 1023, 1032-33 (Fla. 2004). And therefore, prohibiting statues of Jesus or saints, or Jewish grave coverings, on a loved one's grave did not substantially burden religious exercise, and required no justification.

Such decisions illustrate the dangers of intrusive judicial review, without appropriate deference, of claims of substantial burden. Secular legal reasoning based on adversary presentations, without deference to religious understandings, can result in failure to protect important religious practices. Congress addressed such cases by redefining exercise of religion. *Any* exercise of religion is protected, and it need not be compulsory or central to the faith.

But it still must be substantially burdened, and not every indirect, incidental, or attenuated regulatory impact is substantial. Absolute deference on this issue would lead to a different set of errors. Good-faith religious claims of substantial burden should generally be accepted, but courts must ultimately decide the cases and set the outer boundaries.

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[5] Fla. Stat. Ann. §761.02(3).

B. The Regulations in These Cases Do Not Substantially Burden the Exercise of Religion.

1. The regulations at issue here are complex; we will leave the details to the parties. The essence of it is that petitioners object to the government's regulation of the secular insurance companies with which they do business. Petitioners have no right to an exemption for their secular insurers. This is an important line that should not be crossed.

The government has carefully separated the insurers' provision of contraception from petitioners. The secular insurers are required to provide contraception with segregated funds. 45 C.F.R. §147.131(c)(2)(ii). Petitioners do not claim that they are indirectly paying for contraception, and no economic impact can be traced to them, directly or indirectly. *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 857-62 (tracing the economic impact of the 2013 version of the regulations, which have not been changed in this respect).

The insurers are required to provide information about the availability of contraception in segregated communications. 45 C.F.R. §147.131(d). They are required to inform insured employees that their employers—petitioners here—do not "administer or fund contraceptive benefits." *Ibid.* Insurers are encouraged (by a safe harbor if they use the suggested language) to inform employees that their employers "will not contract, arrange, pay, or refer for contraceptive coverage," that the insurer will provide "separate payments" for contraception, that the employer "will not administer or fund" these

payments, and that "any questions" should be directed to the insurer. *Ibid.* The government pursues its goals without petitioners' volition or participation.

2. Petitioners claim that these safeguards are inadequate in multiple ways. They first object to sending the government a letter with contact information for their insurers. They emphasize that the government says the letter is "necessary" to achieve its purposes, implying that this letter acts as some sort of legal authorization. ETBU Br. 24, 44, 47. In context, it is clear that in the two sources these petitioners cite, what the government meant by "necessary" is only that it needs the insurers' contact information in order to inform the insurers of their own regulatory obligations. 79 Fed. Reg. at 51,095 (Aug. 27, 2014) ("the minimum information necessary"); No. 15-35 Br. in Opp. 27 (same).

The Zubik petitioners say the government has conceded that the letter is necessary to ensure "that there is a party with legal authority" to provide contraception, Zubik Br. 49, citing the explanation of the 2013 regulations, which have been superseded on this point in response to *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). The current regulations and their accompanying explanations say nothing about an employer's letter to the government conferring any kind of legal authority. With respect to third-party administrators, the *government's* instruction is the plan instrument that authorizes the third-party administrator to act. 29 C.F.R. §2510.3-16(b); 79 Fed. Reg. at 51,095. For insured plans, insurers who receive the government's instructions "remain responsible for compliance with the statutory and regulatory requirement to provide coverage for

contraceptive services." *Ibid.* That is, insurers of insured plans are "issuer[s]" responsible for their own pre-existing obligation to provide contraception. 42 U.S.C. §300gg-13(a). *See* Resp. Br. 37-38.

Petitioners also object that however the government's plan is authorized and accomplished, the insurers will use the "infrastructure" of petitioners' insurance plans—a word the ETBU brief repeats forty-five times. And they say that they are religiously prohibited from doing business with any insurer that will provide contraception to their employees. Zubik Br. 34-36.

3. To separate these objections for analysis, consider another way the government might have achieved its goals. Suppose the government had dealt only with insurers. Suppose it required that any insurer that either insures or administers an employer-sponsored health plan cover contraception in that plan unless instructed otherwise by the employer, and that if so instructed, then the insurer or third-party administrator must exclude contraception from the employer's plan and provide free contraception separately, with segregated funds and communications, as required by the actual regulations.

On this scenario, the employer would not be required to send any letter or notice. Either the employer would do nothing, and the insurer would comply with its own independent obligation to provide contraception through the employer plan, or the employer would object, and the insurer would take contraception out of the employer plan and comply with its independent obligation to provide it separately. All the regulation would fall on insurers.

These petitioners would still claim that their religious exercise had been substantially burdened. The government would still be using their insurance "infrastructure" to provide seamless coverage for their employees. They would still be doing business with insurers that provide contraception. By requiring employers to provide insurance that could entirely exclude contraception—by requiring them to insure colds and flu and broken bones—the government would have created a situation in which their insurers would provide contraception separately.

Petitioners would make the same argument even if the government entirely repealed any requirement that employers provide insurance. They say they "exercise their religion by offering health insurance to their employees." Zubik Br. 35. And they would no doubt say that this exercise of religion is substantially burdened by regulations requiring insurers to provide separate contraception coverage when they insure or administer an employer-sponsored plan—*even if the government required absolutely nothing of petitioners.*

These objections reach too far. They are in fact objections to the government pursuing its own interests by its own means. Petitioners object to how the government regulates secular insurers.

The objection is not rescued by putting it in terms of having to contract with such insurers. Petitioners object to contracting with insurers who will do separately what petitioners are exempted from doing themselves. No matter how they describe it, their objection seeks to control their secular insurance companies and the government's regulation of those companies. The acts required of them are purely

incidental; they would have the same objections if the government required nothing of them.

Some substantial-burden cases may be difficult, but many, including these cases, are amenable to bright-line rules. Religious objectors are not entitled to exemptions for secular entities they deal with at arm's length, or to control the government's regulation of such entities.

4. This case is ultimately like *Bowen v. Roy*: petitioners object to how the government conducts its own affairs. Here those affairs are external regulation of insurers rather than internal record keeping. But the government does not have to conform its regulation of secular insurers to petitioners' religious beliefs, no matter how deeply held those beliefs may be.

The regulated insurers' conduct is separated from petitioners' insurance plans, with segregated funds and communications, but it is not wholly unconnected. Only petitioners' insured employees get the separate contraception coverage. Insurers presumably use their existing roster of petitioners' employees and addresses; this is the relevant "infrastructure" of petitioners' insurance plans. Petitioners say that the segregated contraception coverage becomes a part of their insurance plan. We doubt that characterization; in every practical sense, contraception coverage is the *government's* insurance plan. The government, and only the government, authorizes and requires it.

But in any event, petitioners are not their insurance plans, and they are certainly not a roster of names and addresses. It is as though the plaintiffs in *Bowen* claimed that their daughter's social security number was an extension of herself, so that the

government was using *her* when it used her social security number. The reality of these cases is that petitioners object to what the government demands of secular insurers with no religious beliefs and no religious objections. Allowing such an extreme claim would tend to discredit RFRA.

We would find substantial burdens in *Swaggart*, where religious teaching was directly taxed; in *Alamo*, where religious objectors were directly regulated with respect to the very point that was religiously significant; in *Lyng*, where there was direct physical interference with worship; and in *Braunfeld*, where the plaintiff suffered economic disadvantage because of his religious practice, long before we would find a substantial burden here. The government has gone to great lengths to insulate petitioners from providing contraception to their employees. Those lengths may not be religiously sufficient for all believers. But they are legally sufficient.

5. Petitioners have not shown a substantial burden on religious exercise, so on one view of RFRA, the case ends here. But there is another way to think about it.

Congress understood RFRA as enacting "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §2000bb(a)(5). Substantial burden and compelling interest work best not as two hermetically sealed requirements, but as a balancing test with a heavy thumb on the scale in favor of religious liberty. Any conceivable burden here can be justified by a weaker government interest that would not be sufficiently compelling to justify a more direct and heavier burden. Government would need a far more compelling reason for requiring petitioners to

provide contraception than for requiring them to insure other medical needs and to provide their insurers' contact information.

The Court often treats the compelling-interest test as such a weighted balancing test. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2760 (describing substantial-burden and compelling-interest test as a "balancing test"); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) ("courts should strike sensible balances, pursuant to a compelling interest test"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 530 (1993) (describing compelling-interest test as "[b]alancing the competing governmental and religious interests"); *Smith*, 494 U.S. at 883 (describing substantial-burden and compelling-interest test as "the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)"); *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) (concluding that the "governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs").

The Court should never forget that the compelling-interest test requires a very high standard of justification. But the question can be sensibly understood as whether the government's interest compellingly outweighs the burden on religion, rather than as two separate yes-or-no inquiries.

The government's regulation of secular insurers imposes no substantial burden on petitioners' exercise of religion. But if there be any doubt about that, whatever modest legal burden might exist here can be

compellingly outweighed by a comparably modest variation on compelling government interest.

II. One of Petitioners' Claims—That the Exemption for Insurers of Churches Must Be Expanded to Include Insurers of Petitioners—Threatens the Existence of All Specific Religious Exemptions.

Both churches and petitioners are wholly exempt from any obligation to provide contraception. But for churches and their integrated auxiliaries (and conventions and associations of churches and the exclusively religious activities of religious orders) the government voluntarily did more. It protected these core religious organizations not just from legally cognizable burdens, but also from burdens in their own religious understandings, *by exempting their secular insurers*. 45 C.F.R. §147.131(a) (exempting "health insurance coverage provided in connection with a group health plan established" by these "religious employers"). The government does not attempt to provide contraception to the affected employees in any other way, presumably because it has found no practical way to do so without using the insurers.

Petitioners argue that this exemption for churches and their integrated auxiliaries and their insurers requires an identical exemption for the much larger group of non-profit religious organizations and their insurers. They principally argue that the exemption for insurers of churches and their integrated auxiliaries defeats any claim of compelling government interest; they also suggest that the distinction between integrated auxiliaries and other religious

non-profits is irrational. ETBU Br. 64-68; Zubik Br. 57-60.

This argument is a mortal threat to thousands of specific religious exemptions crafted by legislatures and administrative agencies. Such exemptions are invalid if they discriminate between faiths or denominations. But specific religious exemptions necessarily have boundaries, and if legislatures and agencies cannot define those boundaries, specific exemptions will not be enacted at all.

A. RFRAs and Specific Exemptions Protect Religious Liberty in Different Ways; Both Are Essential.

Lawmakers protect religious liberty in two distinct ways.

1. Congress and twenty-one states have enacted Religious Freedom Restoration Acts. Laycock, 2014 U. Ill. L. Rev. at 845 n.26 (collecting nineteen citations; Arkansas and Indiana enacted RFRAs more recently). Eleven more states interpret their state constitutions to mean the RFRA standard or something similar. *Id.* at 844 n.22.

RFRAs enact a universally applicable standard. RFRAs are the only way for legislators to address the many religious-liberty issues they cannot anticipate. As a practical matter, RFRAs are the only way legislators can provide equal treatment to all religions, large or small, popular or unpopular.

But RFRA's standard does not directly decide any cases. Courts must apply the standard, identifying substantial burdens, compelling interests, and least restrictive means. Judges often disagree about these

terms, and no legislator can confidently predict how specific RFRA cases will be decided.

2. The other approach is to enact rules that resolve specific religious-liberty issues that can be anticipated in advance. The rule exempting churches, their integrated auxiliaries, *and* their insurers is an exemption of this sort, as is the rule that exempts other religious non-profits but *not* their insurers.

Often these specific exemptions are voluntary on government's part—they exempt more broadly than RFRA, the Free Exercise Clause, or similar state law requires. Or they avoid litigation by protecting religious liberty in cases where it is difficult to predict whether courts would protect claimants under more general provisions.

A legislature or administrative agency considering such a specific exemption can predict, not perfectly but much more confidently than with RFRAs, what its effect will be. Lobbyists for each side can know what they are agreeing to. Exempted entities know what they must do and what they need not do. Litigation is less frequent, and simpler when it happens, because these exemptions state more precise rules. And as the RFRA challenge in this case illustrates, the floor of RFRA and constitutional protection remains for claimants who do not qualify for the specific exemption.

A 1992 survey estimated that state and federal statutes contained two thousand of these specific exemptions. James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445-46 (1992). Many more have been enacted since.

3. Both RFRAs and specific exemptions are essential to religious liberty. RFRAs cover all cases outside the scope of specific exemptions. Within their scope, specific exemptions provide more reliable protection for religious liberty, less dependent on judicial interpretation. Specific exemptions are essential vehicles for legislative and administrative compromise, both on religious liberty and on the bills and regulations to which they are attached. For example, every state that prohibits employment discrimination on the basis of sexual orientation specifically exempts some set of religious organizations,[6] and many of these anti-discrimination laws could not have been enacted without such an exemption.

B. Every Specific Religious Exemption Must Have a Boundary, and Legislatures and Administrative Agencies Must Have Discretion in Drawing It.

1. Every specific religious exemption has a boundary. The boundary can be close in or far out; it can protect all, or many, or only a few of the potential claimants. But unless all claimants are permitted exemptions on demand, some will be within the exemption, and some will be outside it.

Petitioners say that some of them perform the same functions in the same way as integrated auxiliaries whose insurers are exempted. No doubt that is true. But other religious non-profits are very

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[6] Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies* 3-4 (2012), http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf [http://perma.cc/CR9Z-Z733] (listing statutes and exemptions).

different from integrated auxiliaries. Some religious non-profits are subject to the indirect control of a church or denomination; some are entirely independent. Some have a strong religious identity but no affiliation with a church or denomination. Some have a weak religious identity.

At the outer edge of religious non-profits are organizations that retain a nominal religious identity but have largely lost any real religious commitment. *See, e.g., EEOC v. Kamehameha Schools*, 990 F.2d 458 (9th Cir. 1993) (holding that the Kamehameha Schools were no longer sufficiently religious to qualify for the religious hiring exemptions in Title VII). Some organizations at this end of the religious non-profit continuum are not much different from secular non-profits performing similar functions. Beyond these are organizations that have wholly lost any religious mission or identity. Some of our great secular universities were founded by religious leaders to train clergy.

Beyond (or beside) the non-profits are for-profit organizations, some few of which maintain deep religious commitments, as *Braunfeld* and *Hobby Lobby* illustrate. And beyond those are for-profit organizations that are wholly secular. Both inside and outside all the organizations are religious individuals with strong or weak or no religious commitments. Wherever a line is drawn in this expanding circle of possibilities, there will be organizations or individuals just outside the specific exemption who are not much different from other organizations or individuals within the specific exemption.

2. There is rarely one obvious right place to draw the boundary of a specific exemption. In both legis-

latures and administrative agencies, where to draw the boundary is often a compromise among advocates of a broad exemption, advocates of a narrow exemption, and those opposed to any exemption at all. The line often depends on administrative practicalities, on the magnitude of any harm to competing government interests, and on the strength of opposing interest groups. The exemption and its boundary may be drafted or amended in the original bill, in a committee hearing or markup, in a floor amendment, or as here, after protracted notice-and-comment rulemaking. Often, especially in state legislatures, it is drafted hurriedly, amid negotiations. Sometimes it is not drafted well. Courts should not demand perfection.

If such an exemption discriminates between faiths or denominations, it is of course invalid. The remedy may be either to strike the exemption or to expand it to include the faiths that had been excluded.

But if the exemption makes a reasonable effort to distinguish on nondiscriminatory criteria, courts should defer. Legislators and rulemakers may attempt to identify the cases in which the exemption is most needed, or most administrable. They may distinguish the religious core from more peripheral contexts, or more intensely religious contexts from those that are less so. If courts do not defer to reasonable efforts to draw such boundaries, specific exemptions in legislation and administrative rulemaking will become politically impossible.

C. Petitioners' Argument Would Make Specific Exemptions Politically Impossible.

Petitioners' argument would make it impossible for legislators, or contending forces within an agency, to negotiate the scope of specific religious exemptions. No matter where lawmakers draw the boundary, the existence of a religious exemption would show, in petitioners' view, that there is no compelling interest in refusing a broader religious exemption. And no matter where they draw the boundary, there will always be some claimants outside the exemption that are not much different from some claimants inside the exemption. If the Court were to accept petitioners' argument, any narrow religious exemption would automatically be expanded to become an all-inclusive religious exemption.

And that means that most specific religious exemptions would never be enacted at all. Opponents of broad religious exemptions would be forced to oppose even narrow religious exemptions, because any narrow exemption would inevitably lead to a much broader exemption. Supporters of religious liberty could not credibly commit to any compromise on legislation or rulemaking.

Petitioners' argument would thus be Pyrrhic in the extreme. Even if it produced a win for an expansive religious-liberty claim here, it would create forever after an often insuperable obstacle to legislative protection for religious liberty. It would create political pressure to repeal thousands of narrow religious exemptions already enacted, lest they be expanded to become universal exemptions.

D. The Narrow Scope of the Exemption for Insurers of Churches and Their Integrated Auxiliaries Is Sound.

1. The boundary challenged in these cases is perfectly sound. At the heart of communal religion is the church, synagogue, mosque, temple, or other body organized for worship. We use "church" to include them all. An exemption confined to the church itself is narrow, but it is not discriminatory. It exempts the core organization of every faith and denomination.

Integrated auxiliaries are the religious organizations most closely integrated with the church itself, or with a denomination ("a convention or association of churches"), under the rules set out in 26 C.F.R. §1.6033-2(h). Like any other proxy for the closeness of a relationship, these rules are imperfect. But they are entirely reasonable, and they do not discriminate between faiths. The rules for identifying integrated auxiliaries turn on public commitment to the sponsoring church's tenets, the degree of supervision and control by the church, and sources of funding. *Ibid.*

Some religious non-profits that are not integrated auxiliaries are very similar to some that are. But the larger category of all religious non-profits includes organizations thoroughly disconnected from any church or denomination and very different from integrated auxiliaries. And wherever the line is drawn, the problem petitioners point to would remain. Day and night are very different, but at dawn and dusk they are hard to distinguish. Drawing distinctions among the expanding circles of religious organizations is to work in continuous dusk.

An organization may have deep religious commitments without being an integrated auxiliary, as these petitioners illustrate. RFRA does, and should, protect their religious liberty from substantial burdens, even though their RFRA claim in these cases fails. The government has also protected their religious liberty by specifically exempting them from any obligation to provide contraception, putting that obligation on their insurers instead. RFRA does not entitle them to more, because the government has removed any substantial burden from their religious exercise. That government voluntarily exempted the secular insurers of churches and their integrated auxiliaries does not give rise to a RFRA claim for other religious non-profits.

2. The line the government drew is justified by two considerations. First, as already explained, churches and their integrated auxiliaries are at the core of communal religious exercise. Second, exempting the insurers of this core does much less damage to the government's interest than exempting the insurers of all religious non-profits.

Churches and their integrated auxiliaries have some number of employees. But the set of all religious non-profits has that number plus vastly more, including all the employees of religious hospitals and universities. Expanding the scope of the rule for churches and their integrated auxiliaries will inevitably increase the number of employees without access to free contraception. When the government enacts a more protective rule for core religious organizations in a nondiscriminatory way, its willingness to leave x number of employees without free contraception does not require that it leave $x + y$ employees

without free contraception—especially where y is very large.

3. If petitioners' argument were accepted, it would not be limited to RFRA claims. It would also give rise to free-exercise claims that would threaten all specific exemptions enacted at the state and local level. Laws that burden religious exercise but exempt *secular* activity that endangers the government's interests "in a similar or greater degree" are not generally applicable and require compelling justification under the Free Exercise Clause. *Lukumi*, 508 U.S. at 543.

If a narrow *religious* exemption is also a proper comparison for claimants seeking a broader religious exemption, and if, as petitioners assume, it is irrelevant that the broader religious exemption does much more harm to the government's competing interests than a narrow exemption, then a specific religious exemption would defeat the government's claim that a law is generally applicable. Any narrow religious exemption would create a category of cases to which the law would not apply, and the narrow exemption would undermine the government's interests in the same way as a broader religious exemption. It would not undermine those interests to the same extent, but petitioners' argument necessarily rejects that distinction. So under petitioners' argument, any narrow legislative exemption would automatically lead to much broader exemptions under both RFRA and the Free Exercise Clause. And this means that the disastrous consequences of petitioners' argument would not be confined to federal law; specific exemptions would also become politically impossible in state and local law.

All religious organizations with religious objections, including non-profits and closely held for-profits, have been exempted from any obligation to contract, arrange, pay, or refer for contraception. With respect to churches and their integrated auxiliaries, the government does not require anyone else to provide free contraception to the affected employees. With respect to all other exempt employers, the government requires their secular insurers to provide free contraception separately. And to that end, it requires contact information for the insurers.

Even with appropriate deference to religious understandings, petitioners have not shown a substantial burden on the exercise of religion. Nor have they shown that the exemption for the insurers of churches and their integrated auxiliaries must be expanded to the insurers of all religious non-profits—and their argument to that effect threatens the existence of all specific religious exemptions.

CONCLUSION

The judgments should be affirmed.

Respectfully submitted,

K. Hollyn Hollman
Jennifer Hawks
Baptist Joint Committee
200 Maryland Ave., NE
Washington, DC 20002
202-544-4226
hhollman@bjconline.org

Douglas Laycock
Counsel of Record
University of Virginia
Law School
580 Massie Road
Charlottesville, VA 22903
434-243-8546
dlaycock@virginia.edu

February 15, 2016